

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

JUL 19 2010

Thomas Bartlett Whitaker
Petitioner

§
§
§
§
§
§
§

David J. Bradley, Clerk of Court

VS.

No. _____

Rick Thaler, Director
TDCJ-CID

Motion for Appointment of Counsel
IN FORMA PAUPERIS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW David A. Schulman and John G. Jasuta, current court appointed attorneys for Thomas Bartlett Whitaker, and file this Motion requesting the Court appoint them as counsel for Petitioner, as an indigent, and would respectfully show the Court:

I

Background of Case

Petitioner was charged by indictment with the offense of capital murder, upon which the State sought the imposition of the death penalty. On his plea of "Not Guilty," Petitioner was convicted by a jury and a death sentence was imposed. This conviction was affirmed on direct appeal. ***Whitaker v. State***, 286 S.W.3d 355 (Tex.Cr.App. 2009).

Following trial, Petitioner was deemed an indigent in state district court, and his first application for post-conviction writ of *habeas corpus* under Article 11.071, V.A.C.C.P. was timely filed, by the undersigned

counsel, on April 1, 2009. On June 30, 2010, the Court of Criminal Appeals of Texas denied relief.

II

Jurisdiction

Counsel for Petitioner would advise the Court that this is the first federal *habeas corpus* action which is being presented, after the conviction of Petitioner and assessment of the death penalty, and such petition is being presented to this Court pursuant to the provisions of Title 28, U. S. C., Section 2254. Counsel for petitioner further certifies to this Court that upon the appointment of counsel, counsel for will thereafter present to this Court various questions of Federal Constitutional law with regard to his claims for *habeas corpus* relief, and that all such claims presented to this Court have been presented to the state courts of Texas, thus the "exhaustion of state remedies" doctrine has been satisfied.

III

Request for Appointment of Counsel *Pro Hac Vice*

Pursuant to Title 21, Section 848 (q)(4)(B), counsel would set out the qualifications of moving counsel for appointment herein, and attached hereto are the *curriculum vitae* of the movants, indicating their educational background, legal employment history, Bar memberships etc. Movants were Petitioner's court-appointed counsel on State *habeas corpus*.

Prayer

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that this Motion to appoint David A. Schulman and John G. Jasuta as counsel *Pro Hac Vice* for Petitioner in this matter.

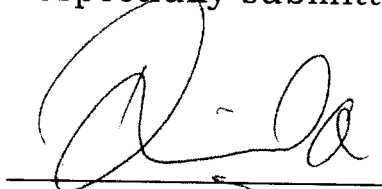
Respectfully submitted,



John G. Jasuta

Attorney at Law
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Austin, Texas 78767-0783
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Tel. 512-704-3550
Fax: 512-532-6282
State Bar No. 10592300

Respectfully submitted,

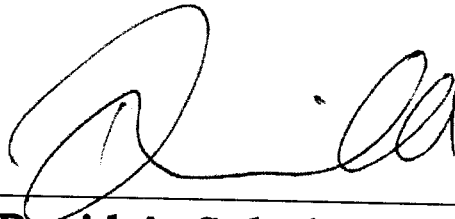


David A. Schulman

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State Bar Card No. 17833400

Certificate of Delivery

This is to certify that a true and correct copy of the above and foregoing Motion for Appointment of Counsel has been or will be hand-delivered, mailed postage prepaid, or transmitted via telecopier, or a portable document format computer document will be transmitted via email, to the office of the Attorney General of Texas, Capital Litigation Division, Attn: Matthew Ottoway; Post Office Box 12548, Austin, Texas 78711, on July 19, 2010.

A handwritten signature in black ink, appearing to read 'D. Schulman', is written over a horizontal line.

David A. Schulman

David A. Schulman

Post Office Box 783
Austin, Texas 78767
eMail: zdrdavid@gmail.com
Tel. 512-474-4747
Fax: 512-532-6282

Biographical Data

EDUCATION:

JD - *Texas Tech University School of Law*, May 1986

Fraternities: *Phi Delta Phi; Omega Lambda Phi*

BA - Criminal Justice / Sociology, *University of Nevada, Las Vegas*, August 1982

PROFESSIONAL EMPLOYMENT HISTORY:

Solo practitioner - 1998 to Present

Partner ("Schulman & Krug") - Austin, Texas 1994 - 1998

Solo practitioner - Austin, Texas 1993 - 1994

Staff Attorney; Texas Court of Criminal Appeals - Austin, Texas 1991 - 1993

Ethics Advisor to the Texas Court of Criminal Appeals 1992 - 1993

Solo Practitioner - Lubbock, Texas 1989 - 1991

Partner ("Chappell, Lanehart, Aldridge & Schulman") - Lubbock, Texas 1988 - 1989

Associate ("Chappell, Lanehart & Aldridge") - Lubbock, Texas 1986 - 1988

Associate ("Law Offices of Floyd Holder") - Lubbock, Texas 1986

CAREER HIGHLIGHTS:

Criminal Law Advisory Commission Member

Texas Board of Legal Specialization; 2007 - Present

Criminal Law Examination Commission Member

Texas Board of Legal Specialization; 2006 - Present

Exam Coordinator; 2008 - Present

Board Certified in Criminal Law, Texas Board of Legal Specialization (1991)

Re-Certified in 1996, 2001 and 2006.

Over 475 post-judgment cases (appeals and habeas corpus); twenty-one (21) capital habeas corpus cases since 1996; numerous appearances before Texas Appellate Courts; U.S. Fifth Circuit Court of Appeals; one appearance at the United States Supreme Court as co-counsel; 77 First Chair Jury Trials; Approx. 25 Second Chair Jury Trials.

David A. Schulman - Biographical Data - Page 2

RELATED ACTIVITIES:

Admitted to Practice:

Supreme Court of the United States 1997

United States Fifth Circuit Court of Appeals 1999

United States District Courts Northern District of Texas 1987

State Bar of Texas 1986 - present

Texas Association of Board Certified Specialists in Criminal Law 1994 - 1998

Texas Association of Post-Conviction Criminal Law Attorneys 2002 - Present

Texas Criminal Defense Lawyers Association 1985 - 2003

Capital *Habeas Corpus* Committee (Co-Chair, 1996-1997; Chair 1997-1999)

Dave's Bar Association (Legal Education and Seminars); 1997 - 2002

Texas Independent Bar Association (Legal Education & Seminars); 2002 - Present

see **www.texindbar.org**

Texas Independent Legal Studies, Inc. (Legal Education and Seminars);

Executive Director 2002 - 2003

REPORTED CASES:

Gardner v. State, ____ S.W.3d ____ (Tex.Cr.App. No. AP-75,582; October 21, 2009)*

Hughen v. State, 297 S.W.3d (Tex.Cr.App. 2009)*

McCarty v. State, 257 S.W.3d 238 (Tex.Cr.App. 2008)*

In re Schulman, 252 S.W.3d 403 (Tex.Cr.App. 2008)

Bartlett v. State, 249 S.W.3d 658 (Tex.App. - Austin 2008)

Ex parte Frazier, 206 S.W.3d 666 (Tex.Cr.App. 2006)

Ex parte Riley, 193 S.W.3d 900 (Tex.Cr.App. 2006)

State v. Kothe, 152 S.W.3d 54 (Tex.Cr.App. 2004)

Green v. State, 137 S.W.3d 356 (Tex.App. - Austin 2004)

Smith v. State, 104 S.W.3d 130 (Tex.App. - Austin 2003)

Bañales v. 13th Court of Appeals, 93 S.W.3d 33 (Tex.Cr.App. 2002).

Granados v. State, 85 S.W.3d 217 (Tex.Cr.App. 2002)

Ex parte Aviles, 78 S.W.3d 677 (Tex.App. - Austin 2002)

REPORTED CASES (CONT):

In re Lee, 76 S.W.3d 811 (Tex.App. - Corpus Christi 2002).**

Rudd v. Johnson, 256 F.3d 317 (5th Cir. 2001)

Texas v. Cobb, 532 U.S. 162 (2001)*

Finley v. Johnson, 243 F.3d 215 (5th Cir. 2001)

Ross v. State, 59 S.W.3d 754 (Tex.App. - Austin 2001)

Hernandez v. Johnson, 213 F.3d 243 (5th Cir. 2001)

King v. State, 29 S.W.3d 556 (Tex.Cr.App. 2000)

Hart v. State, 15 S.W.3d 117 (Tex.App. - Texarkana 2000, pet. ref'd)

Ross v. State, 9 S.W.3d 878 (Tex.App. - Austin 2000, pet. ref'd)

Fain v. State, 986 S.W.2d 666 (Tex.App. - Austin 1998)

Hernandez v. State, 983 S.W.2d 867 (Tex.App. - Austin 1998)*

Fain v. State, 978 S.W.2d 149 (Tex.App. - Austin 1998)

Gonzales v. State, 977 S.W.2d 189 (Tex.App. - Austin 1998, pet. ref'd)*

Gonzales v. State, 966 S.W.2d 521 (Tex.Cr.App. 1998)*

Cooper v. State, 959 S.W.2d 682 (Tex.App. - Austin 1997, pet. ref'd).

Ex parte Davis, 947 S.W.2d 216 (Tex.Cr.App. 1996)*

Ramos v. State, 934 S.W.2d 358 (Tex.Cr.App. 1996)

Arteaga v. Texas DPRS, 924 S.W.2d 756 (Tex.App. - Austin 1996, writ denied)*

Waddell v. State, 918 S.W.2d 91 (Tex.App. - Austin 1996, no pet.)

Vega v. State, 898 S.W.2d 359 (Tex.App. - San Antonio 1995, pet. ref'd)

Stotts v. Wisser, 894 S.W.2d 366 (Tex.Cr.App. 1995)

Hardeman v. State, 891 S.W.2d 960 (Tex.Cr.App. 1995)

Halstead v. State, 891 S.W.2d 11 (Tex.App. - Austin 1994, no. pet.)

Lewis v. State, 889 S.W.2d 403 (Tex.App. - Austin 1994, pet. ref'd)

Hutchins v. State, 887 S.W.2d 207 (Tex.App. - Austin 1994, pet. ref'd)

Hardeman v. State, 868 S.W.2d 404 (Tex.App. - Austin 1993, pet. granted)

Gomez et al v. SBOT, 856 S.W.2d 804 (Tex.App. - Austin 1993, writ granted)

Robbins Bonding v. Roberts, 833 S.W.2d 619 (Tex.App. - Amarillo 1992, no pet.)

David A. Schulman - Biographical Data - Page 4

REPORTED CASES (CONT):

Ex parte Boetscher, 812 S.W.2d 600 (Tex.Cr.App. 1991)

Boetscher v. State, 782 S.W.2d 954 (Tex.App. - Amarillo 1990, pet. granted)

* Appeared as Co-Counsel, either preparing the brief or presenting oral argument.

** Withdrawn - Overruled on other grounds

PAPERS / PUBLICATIONS:

"Appellate Advocacy: Motion for New Trial, Brief Writing and Oral Argument" © 2009

The 21st Century Law Office - You Can Do It on a Criminal Law Practice Budget
©2006 (Texas Bar Journal, Vol. 69, No. 3, March 2006)

TIBA's G&S Texas Criminal Law Report (Co-Author, Publisher 2004-present)

the Greenwood / Schulman report (Co-Author, Editor, Co-Publisher 1993 - 2004)

"Preparing the Case for Trial" © 2002

"Are You Sure You Want to Practice Criminal Defense Here?" © 2002

"The History of Prisons in America" © 1999, 2000

Greenwood's & Schulman's Texas Criminal Law Digest, © James Publishing;
1997 (Co-Author 1997 - 1999)

"Post-Conviction Habeas Corpus Developments 1995-1997; The Situation in Texas" © 1997

"Preparing the Case for Trial" © 1996 (*Voice for the Defense*, Vol. 26, No. 2, Winter 1997)

"On Representing the Indigent" © 1996 (*Voice for the Defense*, Vol. 25, No. 5, June 1996)

"Pending Issues at the Court of Criminal Appeals" © 1996

"Pre-Trial Motions and the Texas Trial Lawyer" © 1996

"Recent Significant Decisions - September 1995 to April 1996" © 1996

"Court of Criminal Appeals Capital Jury Selection Cases 1991-1995" © 1995

"Habeas Corpus and the Trial Lawyer" © 1993

"Post-Conviction Proceedings (Appeals and Habeas Corpus) in Capital Cases" © 1993

"Habeas Corpus and the Trial Court" © 1992

"The State's Right to Appeal" © 1991, 1992 (*Prosecutor's Report*, Vol. 4, No. 1, February 1992); (*Voice for the Defense*, Vol. 21, No. 2, Winter 1992)

David A. Schulman - Biographical Data - Page 5

FACULTY MEMBER

2010 TIBA Spring Criminal Law Course & Live Webcasts (Austin)
2009 TIBA Fall Criminal Law Course & Live Webcasts (Austin)
2009 TCDLA Prairie Dog Lawyers Advanced Criminal Law Seminar (Lubbock)
2009 TIBA Spring Criminal Law Course & Live Webcasts (Austin)
2008 TIBA Fall Criminal Law Course & Live Webcasts (Austin)
2008 FOM / TIBA Southwestern Criminal & Juvenile Law Conference (Laie, Hawaii)
2008 TIBA Fall Criminal Law Course & Live Webcasts (Austin)
2008 TIBA Cuban Law Conference (Coordinator)
2008 TIBA Spring Criminal Law Course & Live Webcasts (Austin)
2007 FOM / TIBA Southwestern Criminal & Juvenile Law Conference (Laie, Hawaii)
2007 TIBA Fall Criminal Law Course & Live Webcasts (Austin)
2007 TIBA Spring Criminal Law Course & Live Webcasts (Austin)
2006 FOM / TIBA Southwestern Criminal & Juvenile Law Conference (Laie, Hawaii)
2006 TIBA Fall Criminal Law Course & Live Webcasts (Austin)
2006 TIBA Spring Criminal Law Course & Live Webcasts (Austin)
2005 TIBA Last Chance Capital Murder Seminar (Austin)
2005 FOM / TIBA Southwestern Criminal & Juvenile Law Conference (Laie, Hawaii)
2005 TIBA Fall Criminal Law Course & Live Webcasts (Austin)
2005 UT LAW Conference on Criminal Appeals (Austin)
2005 TIBA Spring Criminal Law Course & Live Webcasts (Austin)
2004 TIBA Last Chance Capital Murder Seminar (Austin)
2004 FOM / TIBA Southwestern Criminal & Juvenile Law Conference (Laie, Hawaii)
2004 TIBA Fall Criminal Law Course (Austin)
2004 TIBA Spring Criminal Law Course (Austin)
2003 FOM / TIBA Texas Criminal & Family Law Conference (Laie, Hawaii)
2003 TIBA Fall Criminal Law Course (Austin)
2003 TILS Jury Project (San Marcos)
2003 TILS Texas Fair Defense Act Seminar (Huntsville)
2003 TILS Texas Fair Defense Act Seminar (Georgetown)

David A. Schulman - Biographical Data - Page 6

FACULTY MEMBER: (CONT)

2003 TILS Texas Fair Defense Act Seminar (Lubbock)
2003 TILS Texas Fair Defense Act Seminar (El Paso)
2003 TIBA Spring Criminal Law Course (Austin)
2002 TILS Texas Fair Defense Act Seminar (San Antonio)
2002 TILS Texas Fair Defense Act Seminar (South Padre Island)
2002 FOM/DBA Texas Criminal & Family Law Conference (Laie, Hawaii)
2002 TILS Texas Fair Defense Act Seminar (Kerrville)
2002 TILS Texas Fair Defense Act Seminar (Tyler)
2002 TIBA Fall Criminal Law Courses (Austin)
2002 TILS Texas FDA Court Appointed Attorney Certification Course (Midland)
2002 San Antonio Bar Association Criminal Law Institute (San Antonio)
2002 DBA Spring Criminal Law Courses (Austin)
2001 FOM/DBA Texas Criminal & Family Law Conference (Laie, Hawaii)
2001 DBA Fall Criminal Law Courses (Austin)
2001 ACDLA / DBA Ethics Seminar (Austin)
2001 DBA Spring Criminal Law Courses (Austin)
2000 DBA Cuba Law Conference (Havana, Cuba)
2000 DBA Fall Criminal Law Courses (Austin)
2000 ACDLA / DBA Ethics Seminar (Austin)
2000 FOM/DBA Texas Criminal Law Seminar in Hawaii (Laie, Hawaii)
2000 DBA Spring Criminal Law Courses (Austin)
1999 FOM/DBA Texas Criminal Law Seminar in Hawaii (Laie, Hawaii)
1999 DBA Fall Criminal Law Courses (Austin)
1999 ACDLA / DBA Ethics Seminar (Austin)
1999 DBA Spring Criminal Law Courses (Austin)
1998 FOM/DBA Texas Criminal Law Seminar in Hawaii (Laie, Hawaii)
1998 DBA Fall Criminal Law Courses (Austin)
1998 DBA Spring Criminal Law Course (Austin)
1997 TCDLA/ACDLA Trial & Appellate Skills Course (Austin)
1997 CDLP Habeas Corpus Forensic Skills Course (San Antonio)

David A. Schulman - Biographical Data - Page 7

FACULTY MEMBER: (CONT)

1997 DBA Fall Criminal Law Course (Austin)
1997 ACDLA / DBA Ethics Seminar (Austin)
1997 TCDLA Rusty Duncan Advanced Criminal Law Short Course (San Antonio)
1997 TCDLA/FHAP Capital Habeas Corpus Law and Procedure (Austin)
1997 DBA Spring Criminal Law Course (Austin)
1996 CDLP Trial Skills Course (Lubbock)
1996 G/S Fall Criminal Law Course (Austin)
1996 CDLP Capital Seminar / Appeals and Habeas Corpus (Galveston)
1996 CDLP Capital Seminar / Trial of a Capital Case (Houston)
1996 TCDLA Rusty Duncan Advanced Criminal Law Short Course (San Antonio)
1996 CDLP Pre-Trial Skills Course (Midland)
1996 G/S Spring Criminal Law Course (Austin)
1995 G/S Fall Criminal Law Course (Austin)
1995 TCDLA Capital Habeas Corpus Workshop (Houston)
1995 HCBA Capital Murder Certification Course (Houston)
1995 G/S Spring Criminal Law Course (Austin)
1994 G/S Fall Criminal Law Course (Austin)
1994 G/S Spring Criminal Law Course (Austin)
1993 PAPA Fall Immigration Seminar (Austin)
1993 G/S Fall Criminal Law Course (Austin)
1993 PAPA Spring Immigration Seminar (Austin)
1993 HCBA Harris County Appointed Attorneys Certification Course (Houston)
1993 TCJ Texas College of Advanced Judicial Studies (Austin)
1992 TCJ Texas Judicial Conference (El Paso)
1992 SBOT Advanced Criminal Law Course (Houston)
1992 TCJ State Judges Annual Criminal Justice Conference (Dallas)



John G. Jasuta

Attorney at Law
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www.texasappeallawyers.com

Biographical Data

Education:

B.S.Ed. The University of Texas at Austin
Austin, TX. 1972

J.D. St. Mary's University School of Law
San Antonio, TX - December 1974

Employment:

Staff Attorney - Ellis Unit
Staff Counsel for Inmates
Texas Department of Corrections
Huntsville, TX
1975-1976

General Counsel
Texas Board of Pardons and Paroles
Austin, TX
1976-1978

Staff Attorney/Chief Staff Attorney
Texas Court of Criminal Appeals
Austin, TX
1978-2003

Admitted to Practice

State Bar of Texas
Supreme Court of the United States
United States Court of Appeals, Fifth Circuit

Reported Cases

Gardner v. State, ____ S.W.3d ____ (Tex.Cr.App.
No. AP-75,582; October 21, 2009)

Hughen v. State, 297 S.W.3d ____ (Tex.Cr.App.

Quintanilla v. State, 292 S.W.3d 230 (Tex.App. [3rd] 2009)

Garza v. State, 261 S.W.3d 361 (Tex.App. [3rd] 2008)

McCarty v. State, 257 S.W.3d 238 (Tex.Cr.App. 2008)

In re Schulman, 252 S.W.3d 403 (Tex.Cr.App. 2008)

Ex parte Villanueva, 252 S.W.3d 391 (Tex.Cr.App. 2008)

Ex parte Frazier, 206 S.W.3d 666 (Tex.Cr.App. 2006)

Ex parte Riley, 193 S.W.3d 900 (Tex.Cr.App. 2006)

Publications

Books:

Post-Conviction Remedies Pursuant to Article 11.07, VACCP,

Distributed by Texas Independent Bar Association

A copy of this book is provided at no charge to the writ room law library at each of the units of the Texas Department of Criminal Justice, Institutional Division.

Texas Criminal Writ Practice - with Richard Wetzel and Catherine Greene Burnett,
International Publishing Company, Austin, 1997.

Magazines:

"Time Credits and Related Problems," Texas Bar Journal, October 1988.

"Don't Give Up! Help's On the Way! Assigning senior and former judges in 1107 habeas corpus matters," In Chambers Magazine, Vol. 28, No. 3, Winter 2001, written with Judges P.K Reiter, Curt Steib, and Olen Underwood.

Papers:

Mr. Jasuta has written extensively on the subject of *habeas corpus* for the State Bar of Texas as well as the Texas Independent Bar Association, Texas District and County Attorneys Association, Texas Criminal Defense Lawyers Association, and several local Bar Associations.

The papers include, but are not limited to:

“AN INTRODUCTION TO POST CONVICTION HABEAS CORPUS PROCEDURE,” University of Texas CLE program on post-conviction remedies, 2002.

“An Introduction to Post Conviction Habeas Corpus for Laypeople and Others Who Never Thought They’d Care.” Texas Independent Bar Association, www.texindbar.org.

Post Conviction Remedies Pursuant To Article 11.07, V.A.C.C.P., State Bar of Texas, Texas Criminal Appellate Manual (1996).

“Habeas Corpus” - Prosecutor’s Appellate Manual, Texas District and County Attorney’s Association, 2003- present, with Gail McConnell.
An

The Law Office of David A. Schulman



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Austin, Texas USA 78767
Tel: 512-474-4747
Fax: 512-532-6282

July 17, 2010

Hon. Michael Milby, Clerk
U.S. District Court
515 Rusk Street Rm 5401
Houston, TX 77002

United States Courts
Southern District of Texas
FILED

JUL 19 2010

Clerk of Court

United States Courts
Southern District of Texas
FILED

Clerk of Court

Re: Motion for Appointment of Counsel / Thomas Bartlett Whitaker

Dear Mr. Milby:

Thomas Bartlett Whitaker (TDCJ-CID No. 999522) was convicted of capital murder and sentenced to death in Ft. Bend County. John Jasuta and I were appointed to represent him in his state *habeas corpus* proceeding and timely filed a *habeas corpus* application under Article 11.071, C.Cr.P. The Court of Criminal Appeals denied relief on June 30, 2010.

As required by Article 11.071, § 2(e), C.Cr.P., Mr. Jasuta and I are submitting the attached motion for appointment of counsel. I have forwarded a *in forma pauperis* form to Mr. Whitaker today and will supply it to the Court as soon as it has been received.

I have also attached a copy of the first page of the motion. Please return it to me, after it has been file marked, in the attached envelope.

Please feel free to contact me if there are any problems or questions.

Sincerely,

David A. Schulman

DAS:nc